Supreme Court, U.S.
FILED
FEB 4 - 2004
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(3)

Case No. 03-931

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

JOE ELTON NIXON,

Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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In his response to the Petition for Writ of Certiorari, Respondent asserts this case presents no "important federal question," because it is a narrow ruling, confined to its facts, that will have no affect on future cases in Florida. Indeed, he argues, the "prophylactic rule" announced by the Florida Supreme Court has become a "settled drill" which need not be "upset" at this juncture, even if the constitutional underpinnings of the decision below "were questionable." Petitioner will reply briefly to these assertions, in the same order as presented by Respondent in his Argument.

1. Respondent asserts, first, that the decision "immediately at issue here" involves merely a "fact-bound" determination of consent, as to which Petitioner does not seek review. Brief for the Respondent in Opposition (hereafter Response) at 8. While it is true, as Respondent asserts, that Petitioner seeks review of the legal standard announced in Nixon

II and applied in Nixon III,[1] Petitioner also seeks review of the determination by the court in Nixon III overturning the finding of waiver by the circuit court on remand. See Petition, Part 1(D), pp 27-29. Nor is this determination "fact-bound," as Respondent contends. There is no dispute about the facts; Petitioner's contention (set out in the Petition) is that the Florida Supreme Court applied the wrong Constitutional standard, and that its decision is in conflict with decisions of this Court and of lower federal courts.

2. Respondent next argues that "Nixon II was a narrow decision from the outset," and will have little or no impact in Florida. On the contrary, the decision in Nixon II is having a significant impact in Florida, as evidenced by very number of cases Respondent cites addressing, and granting relief on, Nixon issues in the short time that Nixon II has been decided.[2]

3. Respondent argues in Paragraphs 3 and 4 of his Response that Nixon II is an "amalgam" of federal and state law, and that the "mandatory prophylactic procedure" crafted in Nixon II has become a "standard feature of local Florida practice" to which "Florida judges and practitioners are now habituated," and will prevent similar issues from arising in the future, as evidenced by the lack of reported appellate decisions in which "trial proceedings conducted after January 27, 2000" have been called in question.

The legal issue addressed in Nixon II, however, was a strictly federal constitutional issue, which the Florida Supreme Court resolved by its (erroneous) application and interpretation of this Court's decisions in Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); and Boykin v. Alabama, 395 U.S. 238 (1969). Further, the "prophylactic procedure" adopted by the Florida Supreme Court itself implicates federal issues, unnecessarily "meddling in the attorney-client relationship," Taylor v. United States, 287 F.3d 658 (7th Cir. 2002), and imposing the kind of "mechanical rules" on counsel criticized by this Court in Strickland and since.[3]

Nor can it be said that the Nixon II "prophylactic drill" (Response at 10) has become a "routine" procedure to which the bench and bar are now habituated, or that it will "avoid similar problems." Respondent, whose counsel does not practice in Florida, supports these assertion only with an alleged absence of reported decisions calling into question trials conducted after January 27, 2000. However, defendants tried since that date simply have not completed the postconviction proceedings at which they would attack effectiveness of trial counsel. As for

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[1] As noted in the Petition, Nixon II refers to Nixon v. State, 572 So.2d 1336 (Fla. 2000), while Nixon III is Nixon v. State, 857 So.2d 172. Respondent made no argument on the merits in his response to the petition for writ of certiorari in Nixon II, but argued only that Nixon II was not a final decision. See Brief of Respondent in opposition, Case. No. 00-396. As to the federal issues presented in the instant Petition, Nixon III is a final decision, and Respondent does not contend otherwise.

[2] As noted in the Response, four appellate decisions have ordered evidentiary hearings, while one defendant has obtained a new trial based on the rule set out in Nixon II. Moreover, there are no boundaries that the Florida Supreme Court will not traverse nor lower appellate courts abide with in regard to the expansion of Cronic's standard, contrary to this Court's recent decisions cited in Paragraph 5 of this Reply. At a minimum, the Florida Supreme Court should be required to apply this Court's recent decisions to Respondent's case.

[3] Arguably, if a defendant were to stand mute during such "prophylactic" inquiry, the trial court would be obliged under Nixon II (which requires "affirmative" and "explicit" acceptance, "in words," of counsel's strategy) to order counsel to change his strategy, no matter how ultimately beneficial counsel or the court might deem that strategy to be. Moreover, Respondent's reliance on North Carolina's practices to resolve a claim of ineffective assistance of counsel (Response at 11, n. 4) does not answer any question raised here.

cases tried before 2000, a case is now pending in the Florida Supreme Court, and scheduled for oral argument this week, in which a Nixon concession-of-guilt issue has been raised despite the trial court having tried to conduct the same "prophylactic" questioning later prescribed in Nixon II; the court's attempt to do so was stymied by the defendant's refusal to answer the court's questions.[4] Petitioner would assert that the "prophylactic drill" envisioned by the Florida Supreme Court is not yet "routine," and, even if it becomes so, it will not prevent Nixon issues from arising in the future.[5]

4. In his paragraph 6 (there is no paragraph 5 in the Response), Respondent argues that Nixon II "marked no innovation in Florida criminal procedure or jurisprudence," because it merely applied to trial counsel's strategic decision standards previously developed for resolving the voluntariness of guilty pleas. Petitioner deems such application a significant "innovation" of law; further, this argument utterly fails to address the merits of the issue posed by Petitioner, which is whether the Florida Supreme Court erred by treating concessions of fact by counsel to be the functional equivalent of a guilty plea.

5. Finally, Respondent argues that there is no present conflict in the federal courts; according to him, the cases cited by Petitioner are old, and recent cases from this Court (i.e., Roe v. Flores-Ortega, 528 U.S. 470 (2000); Mickens v. Taylor, 535 U.S. 162 (2002); and Bell v. Cone, 535 U.S. 685 (2002)) have had a "powerful, pervasive" impact that is "uniform across the Circuits." Response at 15. Regardless of the impact of this Court's decisions on the lower federal courts, however, it is obvious that this Court's recent decisions have had no "powerful, pervasive impact" on the Florida Supreme Court, which simply ignored these decisions, as Petitioner noted in its Petition. Even if there is no present inter-circuit conflict in the federal courts, the decision below clearly conflicts with decisions of this Court and with decisions of the lower federal courts, as set out in the Petition.

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[4] See Dillbeck v. State, Case No. SC02-2044, scheduled for oral argument on February 3, 2004. The appellate briefs in Dillbeck are a public record, available online at the website of the Florida Supreme Court. Dillbeck's trial occurred before the decision in Nixon II, but after Nixon's trial, and Dillbeck's trial judge was aware that an issue raised in Nixon's direct appeal had been his counsel's concession of guilt without his consent.

[5] As demonstrated by Harvey v. State, 28 Fla. L. Weekly S513 (Fla. July 3, 2003)(pending on motion for rehearing), the potential scope of the *per-se* effectiveness standard of Nixon II extends well beyond explicit concessions of guilt. Harvey's counsel vigorously contested his guilt of first degree murder, but was found to be ineffective *per se* under the standard of Nixon II because he conceded certain incontestable facts, and merely argued that those facts did not establish Harvey's guilt. Thus, under Nixon II, trial courts in Florida arguably must obtain a defendant's express consent to *any* concession of fact and, without such, order defense counsel to contest that fact, whether or not doing so would be in the defendant's best interests.

CONCLUSION

Noticeably absent from the Response is any argument that the Florida Supreme Court below correctly applied this Court's precedents. It did not. Moreover, that court's decision has had and will continue to have far-reaching impact on criminal trials in Florida. The standard announced and applied by the court below is erroneous and in direct conflict with this Court's precedents, for all the reasons set out in the Petition and in this Reply, and Petitioner would respectfully ask this Court to grant the Petition.

Respectfully submitted,

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